APPENDIX

FCC 71-543
62964

Before the

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

File No. BPCTI-11

In the matter of:

COMMUNICATIONS IMPROVEMENTS, INC.
Jackson, Mississippi

Motion to discontinue operation
and to impound profits

Memorandum Opinion and Order

Adopted: May 19, 1971 Released: May 21, 1971

By the Commission: Commissioners Bartley and Robert E. Lee absent. Commissioner Johnson concurring in part and dissenting in part.

1. Now under consideration are: (a) a motion filed April 20, 1971, by Communications Improvement, Inc. (CII), grantee of an interim authorization to operate a commercial television broadcast station on channel 3, Jackson, Mississippi, seeking an order from the Commission that would (1) require Lamar Life Broadcasting Company (Lamar) to discontinue operation of television broadcast station WLBT, channel 3, Jackson, Mississippi, (2) impound the profits generated by the station since September 8, 1970, and (3) in the alternative, give a declaratory ruling that our stay of the effective date of the grant of interim

authority to CII expired on April 17, 1971; and (b) an opposition to the motion filed April 26, 1971, by Lamar.[1]

2. CII's motion arises out of the following events. In *Lamar Life Broadcasting Company,* 25 FCC 2d 101, released May 4, 1970, we designated for comparative hearing five competing applications for a construction permit to operate a commercial television station on channel 3, Jackson, Mississippi. Subsequently. we granted interim authority to CII to operate station WLBT(TV) pending the outcome of a final determination on the applications in hearing, *Lamar Life Broadcasting Company,* 26 FCC 2d 100, 20 RR 2d 167, released September 8, 1970. In *Lamar Life Broadcasting Company,* 25 FCC 2d 619, released September 16, 1971, we denied Lamar's petition for stay pending judicial review. We did order, however, that:

> . . . if Lamar Life Broadcasting Company notifies the Commission within two (2) days of the release date of this Order that it intends to seek a stay from the United States Court of Appeals for the District of Columbia Circuit and seeks such a stay within seven (7) days of the release date of this Order, our Memorandum Opinion and Order, *Lamar Life Broadcasting Company,* FCC 70-957, released September 8, 1970, IS STAYED until thirty (30) days after the Court acts on Lamar Life Broadcasting Company's motion for stay. (25 FCC 2d at 620).

Lamar seasonably filed a motion for stay with the Court and thereby came within the terms of the quoted language. On March 17, 1971, the Court issued a *per curiam* order (Case No. 24,613) upholding our September 8th decision on the merits and dismissed as moot related motions, including Lamar's motion for stay pending appeal. On March

[1] We consider CII's motion to be one for temporary relief under section 1.45(d) of our rules. Under that rule, no reply pleadings are permitted. We therefore deny CII's motion to accept a reply pleading filed May 3, 1971. We also deny Lamar's motion to file a supplemental pleading, filed May 3, 1971, to respond to CII's reply.

30, 1971, Lamar filed with the Court a petition for rehearing of the *per curiam* order and suggested a rehearing *en banc*. The Court denied that petition on April 30, 1971. On May 14, 1971, the Court granted Lamar's motion to stay mandate until May 30, 1971.

3. Lamar takes the position that an opinion of the Court of Appeals is not self-executing[2] and that it takes the issuance of a mandate for the Court to "act."[3] Pending court action, according to Lamar, the Commission may preserve the *status quo*, but may not decide substantive rights that are the subject of the appeal.[4] Since the Court has stayed its mandate, and since Lamar has petitioned for a writ of certiorari from the Supreme Court which automatically stays the issuance of a mandate under Rule 41 of the Federal Rules of Appellate Procedure, Lamar concludes that the Court has not "acted." Thus, Lamar asserts, the stay of the effective date of the grant of interim authority to CII is still in effect under the terms of the Commission's Memorandum Opinion and Order to September 16, 1970, which is cited and, in part, quoted above. Since the stay and the merits of the case both go to the issue of whether Lamar is to continue operation of station WLBT(TV), Lamar also contends that a grant of CII's motion would not preserve the *status quo* but would decide the substantive issue before the Court. Lamar urges, therefore, that the stay should remain in effect to preserve the *status quo* so as not to "oust the Court of its jurisdiction."

4. CII takes the position that the Commission expressly denied a petition for stay pending judicial review on the merits. The Commission's stay, CII argues, was only to

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[2] Citing *Petition of Buscaglia*, 145 F. 2d 428 (1st Cir. 1944).

[3] Citing *Merrimack River Savings Bank* v. *Clay*, 219 U.S. 527, 31 S. Ct. 295 (1911); *Gill* v. *Commissioner of Internal Revenue*, 306 F. 2d 902 (3rd Cir. 1962); and *Bailey* v. *Henslee*, 309 F. 2d 840 (8th Cir. 1962).

[4] Citing *Newton* v. *Consolidated Gas Co.*, 258 U.S. 165, 42 S. Ct. 264 (1922).

afford Lamar an opportunity to seek a stay from the Court. The Court has now issued a decision on the merits and dismissed the motion for stay as moot. CII contends that if the Commission's stay order is interpreted, as Lamar does, to require the issuance of a mandate ". . . the effect would be that Lamar would obtain under paragraph 4 (quoted above) of the Commission's stay order the very relief which the Commission expressly denied . . ."

5. In our decision of September 16, 1970, we denied Lamar's request for a stay pending judicial review of the entire proceeding. Instead, we granted a stay solely to afford the Court the opportunity to pass on a motion for stay to be filed by Lamar. Lamar would read our decision as granting, rather than denying, its motion for stay pending judicial review. It is true, of course, that a court technically acts on the merits by issuing a mandate. However, a mandate is not issued as to orders disposing of motions for stay. Thus, the Court "acts" on a motion for stay by issuing its order. In this case this was done by the Court's order of March 17, 1971, in Case No. 24,613. We had anticipated that the Court would have acted on the motion for stay prior to a decision on the merits. We do not believe, however, that a different result obtains because the Court issued a decision on the merits and, in the same document, dismissed as moot the motion for stay. We are of the view, therefore, that the Court has acted and that our stay has dissolved by its own terms.[5] Accordingly, we hold that the grant of interim authority to CII was effective at 3:00 a.m., April 17, 1971. As will be seen below,

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[5] In our opposition to Lamar's motion to stay mandate, we advised the Court that this was our interpretation and that, unless the Court expressly directed otherwise, the Commission would feel free to reach a decision on the motion now under consideration. Lamar, responding to that pleading, urged that any order staying the mandate should make clear that the effective date of our grant of interim authority to CII is also to be stayed. The Court considered those pleadings but declined to add the language suggested by Lamar.

if Lamar wishes to seek a judicial stay of our action, there will be time to file an appropriate petition.

6. Lamar nevertheless continues to operate station WLBT(TV) based on its interpretation of when the Court "acts." This brings us to the question of the disposition of profits resulting from Lamar's continued operation of the station. CII urges that we impound profits from September 8, 1970, the date of release of our Memorandum Opinion and Order granting CII's application for interim authority. However, having once declined to impound profits, *Lamar Life Broadcasting Company,* 21 FCC 2d 277, 18 RR 2d 274 (1970), we agree with Lamar that impounding of profits as of that date would be unconscionable. We do believe that it is appropriate, in these circumstances, to impound profits as of the effective date of the grant of interim authority; that is, April 17, 1971. In this manner, we shall continue the station's service to Jackson, but shall not permit Lamar to profit by its continued operation. We expect the profits to be deposited in an escrow account at a financial institution that is mutually acceptable to CII and Lamar. In determining profits, we shall require Lamar to use the accounting practices and procedures it now uses for Federal income tax purposes. We shall also require that Lamar provide us and/or CII with an accounting at such intervals as we may deem appropriate.

7. There is good reason for permitting Lamar to continue operation of station WLBT(TV) for a brief period, since CII is not in a position to take over operation of the station. It has not filed a license application, a request for program test authority, or a request for a call sign. In addition, Lamar alleges that a loan to CII from the United Methodist Church, upon which we relied in finding CII financially qualified, has not been reduced to final form. Accordingly, CII should submit as soon as possible a license application, appropriate requests for program test authority and for a call sign, and an executed copy of an appropriate loan agreement for $300,000.

8. After CII files all the material requested above, we believe that it is appropriate to permit the parties a further ten-day period to complete their negotations as to employees, the leasing of facilities, and other aspects of the transfer. Although both Lamar and CII allege that, to date, the other has not been negotiating as expeditiously as it might, we do not believe that a significant question as to a lack of good faith has been raised. We expect good faith bargaining will result in a satisfactory agreement within the further ten-day period specified above. Upon the execution of a satisfactory agreement between Lamar and CII, any funds in the escrow account will be turned over to CII for distribution in accordance with its representations to us.

9. Accordingly, IT IS ORDERED that, to the extent indicated above, the Motion of Communications, Improvement, Inc., IS GRANTED, and in all other respects IS DENIED.

10. IT IS FURTHER ORDERED that Lamar Life Broadcasting Company WILL PLACE IN ESCROW all profits generated by the operation of station WLBT(TV) after 3:00 a.m., April 17, 1971, in a financial institution that is mutually acceptable to Lamar Life Broadcasting Company and Communications Improvement, Inc.

11. IT IS FURTHER ORDERED that "profits" shall be determined by the accounting practices and procedures used by Lamar Life Broadcasting Company for Federal income tax purposes.

12. IT IS FURTHER ORDERED that Lamar Life Broadcasting Company shall submit an accounting of profits to the Commission and/or Communications Improvement, Inc., at the Commission's request at such intervals as we may deem appropriate.

13. IT IS FURTHER ORDERED that Communications Improvement, Inc., SHALL SUBMIT a license application; appropriate requests for program test authority and for a call

sign; and an executed copy of an appropriate loan agreement for $300,000.

14. IT IS FURTHER ORDERED that when Communications Improvement, Inc., complies with all the requirements of paragraph 13, above, Lamar Life Broadcasting Company and Communications Improvement, Inc., shall have an additional ten (10) days from that date to reach an agreement as to the transfer of operation of station WLBT(TV) to Communications Improvement, Inc., and, upon the execution of that agreement, any funds in the escrow account SHALL BE PAID to Communications Improvement, Inc.

FEDERAL COMMUNICATIONS COMMISSION

/s/ BEN F. WAPLE
Ben F. Waple
Secretary

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D. C. 20554

May 28, 1971

In reply refer to:
8820

Communications Improvement, Inc.
4074 North State Street
Jackson, Mississippi 39206

Gentlemen:

This is in reference to the materials tendered by you on May 26, 1971, in response to the Commission's Memorandum Opinion and Order (subsequently "Order") in *Communications Improvement, Inc.*, FCC 71-543, adopted May 19, 1971, released May 21, 1971.

The materials submitted comply with the Commission's Order. Accordingly, the ten-day period permitted by the Order within which to reach an agreement as to the transfer of operation of station WLBT(TV) from Lamar Life Broadcasting Company to you expires at 3:00 a.m., June 7, 1971. Program test authority will be issued to you in due course.

Sincerely yours,

/s/ FRANCIS R. WALSH
Francis R. Walsh
Chief, Broadcast Bureau

cc:
LAMAR LIFE BBOADCASTING COMPANY
MOORE, BERSON, HAMBURG & BERNSTEIN
ARNOLD & PORTER

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,613—September Term, 1970

LAMAR LIFE BROADCASTING COMPANY,

Appellant,

—v.—

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

CIVIC COMMUNICATIONS CORPORATION, DIXIE NATIONAL BROADCASTING CORPORATION, JACKSON TELEVISION, INC., COMMUNICATIONS IMPROVEMENT, INC., CHANNEL 3, INC.,

Intervenors.

Before:

McGOWAN and TAMM,

Circuit Judges.

Order

On consideration of appellant's motion for clarification of order staying mandate so as to maintain status quo pending final disposition by Supreme Court of Lamar's petition for writ of certiorari, the oppositions thereto, and the reply of appellant to those oppositions, it is

ORDERED by the Court that the motion for clarification is denied.

The Court considers there to be no stay on the transfer of operating authority for the station currently in effect.

Per Curiam

United States Court of Appeals
for the District of Columbia Circuit
FILED JUN 4 1971
s/ NATHAN J. PAULSON
Clerk